Since the Commission has a policy of not making audit information publicly available except under extraordinary circumstances, the Joint Parties are confused and troubled by a statement in footnote 109 of the **Notice**:

> The Commission has also made clear that the Bureaus and Offices who may be custodians of such audit records have the authority to disclose such information where the information is required to be disclosed under the provisions of the FOIA.

Information that is withheld under the "impairment" prong of **National Parks** , by definition, is never "required to be disclosed under the provisions of the FOIA." Thus, there would be no circumstances in which the FOIA would require the release of audit information. More importantly, the assertion that "Bureaus and Offices" have the authority to disclose audit information is directly contrary to the provisions of Section 220(f) of the Communications Act. Section 220(f) states unequivocally:

> (f). No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinabove provided, except insofar as he may be directed by the Commission or by a court.

Under appropriate circumstances, the Commission may delegate to its staff the authority granted to the Commission by law.[45] However, certain functions cannot lawfully be delegated to the staff. Specifically, the Commission cannot delegate the disclosure functions governed by Section 220(f), since the Act requires that the disclosure be "directed by the Commission or a court." A delegation of authority necessarily allows the staff to exercise discretion with regard to the subject matter of the delegation. But Section 220(f9) precludes the exercise of that discretion by anyone other than the Commission or a court. If delegated authority were to be construed

[45] 47 U.S.C. § 155.

broadly enough to allow the staff to disclose audit information in its own discretion without express authorization by the Commission, Section 220(f) would be effectively written out of the law.[46]

Additionally, since the Commission has a policy of not routinely disclosing audit information, any release of such information requires weighing the potential impairment of carrier cooperation with the Commission in future audits against the public interest in the release of audit information in the case at hand. Such policy decisions must be made by the Commission, not the staff.[47]

The **Notice** also seeks comment on whether and in what circumstances audit information should be released under a protective order.[48] Release of audit information to a person seeking such information to use in litigation against the carrier is likely to impair cooperation in future audits, whether or not the release is pursuant to a protective order.

It is obvious that release of the audit files of the Commission, even pursuant to a protective order, to a party engaged in or contemplating litigation with the carrier would be

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[46] The **Notice** cites **Amendment of Part 0 of the Commission's Rules with respect to Delegation of Authority to Chief, Common Carrier Bureau**, 104 FCC 2d 733, 737 (1986)("**Delegation Order**") as authority for the proposition that the Commission has delegated authority to disclose audit information to the "Bureaus and Offices" having custody of the records. The **Delegation Order** was much more limited in scope. It amended Section 0.291(b) of the Rules to delegate to the Chief, Common Carrier Bureau the authority to "approve the release to state public utility commissions such information as the Bureau may obtain during the course of its audit activities which falls within the common interest and jurisdiction of the Commission and the states." 104 F.2d at 734. This language was later removed from Section 0.291(b). See **Delegation of Authority to the Chief, Common Carrier Bureau, and Technical Corrections and Deletions**, FCC 90-257, 55 FR 30460 (1990). At no time has the Commission expressly purported to delegate to its staff "Bureaus and Offices" authority to authorize public disclosure of audit information covered by Section 220(f).

[47] 47 C.F.R. § 0.291(a)(2).

[48] **Notice**, para. 52.

wholly inconsistent with the "impairment" prong of Exemption 4. As discussed above, if the Commission abandons its non-disclosure policy with respect to audit materials, carriers will of necessity approach each audit as if it were engaged in formal litigation with an adverse party. This will certainly impair the willingness of the carrier to go beyond meeting the Commission's literal requests in future audits. For these reasons, the Commission should not release audit information to private litigants pursuant to protective orders.

7. Surveys and Studies.

The Joint Parties believe that the Commission should not restrict the protection available for confidential treatment of information submitted to the Commission in response to surveys and studies.[49] Even when the information is of a type that the Commission is specifically authorized by statute to obtain from the party, the provision of such information should be considered "voluntary" in the context of surveys and studies, and therefore evaluated under the **Critical Mass** standard. In the context of surveys and samples, the "impairment" prong of **National Parks** also justifies confidential treatment of the data, since the public interest in securing the cooperation of the party providing Exemption 4 material will generally outweigh any interest in favor of public disclosure of such material. The Commission should be able to aggregate or summarize individually identifiable information in its reports or rulemaking notices in such a way as to protect the confidential information of the submitting party.

In addition, the Commission should structure its surveys to permit, to the extent possible, respondents to answer the survey without disclosing proprietary and confidential commercial

[49] **Notice**, para. 53.

information. Such a policy will not only reduce the need to protect confidential information, it will also ease the data collection burden on respondents.[50]

D. Scope of Materials Not Routinely Available for Public Inspection.

1. Categories of Materials that are not Routinely Available for Public Inspection.

The Joint Parties agree with the suggestion in the **Notice** that the Commission should expand the categories of information not routinely available for public inspection listed in Section 0.457 of the Rules.[51] The Commission should codify the **Critical Mass** standard and list in Section 0.457: "Information provided voluntarily to the Commission subject to a certification by the provider that such information is not customarily disclosed". The Commission should also list in Section 0.457: "Information submitted in connection with audits, investigations and examination of records." The Commission should also modify Section 0.459(e) to adopt the meaning of "compelled" adopted by the Court in **Critical Mass**.[52]

The Joint Parties recommend that Section 0.455(b)(11) be amended to read as follows:

> (11) Tariff schedules for all charges for interstate and foreign wire or radio communications filed pursuant to Section 203 of the Communications Act, and such information and correspondence in support thereof that is not exempt from public disclosure.

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[50] See, e.g., In the Matter of Telecommunications Access Provider Survey, CCB-IAD 95-110, in which virtually all parties recognized the need for confidentiality due to the level of detail that the Commission proposed to collect.

[51] **Notice**, para. 55.

[52] The parenthetical phrase in Section 0.459(e) should be amended to read: "(i.e., absent a direct order of the Commission compelling the submission, or the issuance of a subpoena or other legal process)".

This amendment would clarify that Section 0.455(b)(11) is not a substantive rule requiring public disclosure of tariff support material, but an administrative rule dealing with what information will be placed in the FCC Reference Center. This amendment does not change existing law, since the lead paragraph of Section 0.455 already excepts from disclosure information that is covered by Sections 0.457 and 0.459 of the Rules.

2. Substantiating Confidentiality Claims.

If the Commission adopts the standards for nondisclosure of Exemption 4 material proposed herein by the Joint Parties, the need for extensive substantiation will be eliminated. For example, where parties rely on protective orders, case-by-case adjudication of confidentiality requests are unnecessary. In other cases, the Commission should have little trouble evaluating whether information submitted voluntarily is of a type that would routinely be made publicly available. For information that was compelled, the two prongs of the **National Parks** test are reasonably self-explanatory. The "impairment" prong is essentially a policy decision of the Commission which is not subject to substantiation. The "competitive harm" prong may require substantiation, but the existing requirements of Section 0.461(c) appear adequate.

In any event, the Commission should not adopt the substantiation requirements proposed in paragraph 57 of the **Notice**. Such requirements would be burdensome,[53] inherently arbitrary,[54]

[53] Identification of the specific portions of documents that are entitled to confidential treatment in advance of any request for access to such information is inherently burdensome, and cannot anticipate and respond to the purported needs of the party requesting access to the information.
[54] Parties who cannot anticipate how long a given piece of information should be exempt from public disclosure will be required to make an arbitrary estimate that is likely to exceed the actual need for confidential treatment.

subject to change,[55] and underinclusive.[56] The Joint Parties therefore recommend that with one exception the Commission defer requiring parties to substantiate Exemption 4 claims until an actual request for disclosure of claimed confidential information is received, and the Commission has determined that the requesting party has made a prima facie "persuasive showing" for disclosure.[57] At that point, the submitter should be required to substantiate its request for nondisclosure information establishing that the information is within the scope of Exemption 4, and that the public interest favors nondisclosure in response to the particular FOIA request that has been filed with the Commission.

The one exception should be for supporting materials submitted with tariffs and for which complete confidentiality is sought. To facilitate timely tariff review, a party seeking complete confidentiality of tariff materials should be required to substantiate their claim at the time the tariff is filed.

The Commission should not seek to deter claims of confidentiality as a matter of policy or practice.[58] In a competitive environment, it is important that carriers regulated by the Commission be afforded the same protection for confidential financial and competitive information that is available to unregulated parties. The standards proposed by the Joint Parties herein are designed to insure that parity.

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[55] The measures taken by the business to prevent undesired disclosure, the extent to which the information has already been disclosed, and the degree of competition facing the service in question are all criteria that are subject to change between the time a request for confidential treatment is made and the time a request for disclosure is received.

[56] "Substantial competitive harm" is just one of the criteria for nondisclosure under **National Parks**, and ignores the lesser requirements of **Critical Mass** applicable to information submitted voluntarily to the agency.

[57] The Commission should retain Section 0.459(e), which permits parties to request the return of documents submitted voluntarily if their request for confidential treatment is denied.

[58] **Notice**, para. 58.

3. Aggregated or Redacted Information.

The Joint Parties agree with the suggestion in paragraph 59 of the **Notice** that the use of aggregated or redacted information may strike an appropriate balance between the need of a party for protection of confidential information, and that the public interest in making policy decisions based on factual information. One means of ensuring that the appropriate balance has been struck would be to provide to the submitters of the information the specific form in which release is contemplated, and allow the submitter an opportunity to concur in the proposed release or to submit an alternative form of release that better protects the confidential data.

E. Proposed Clarifications to Commission Rules.

As previously discussed, the Joint Parties concur with the suggestion contained in paragraph 60 of the **Notice** that the Commission codify its existing practice of deferring action on requests for confidentiality until a request for inspection is made. The Joint Parties recommend that the Commission adopt rules similar to those contained in Section 0.459(g) that would provide for telephonic notification to the submitter, with a follow-up in writing, of any request for release of information as to which a claim of confidentiality has been made. The submitter would then have five business days in which to submit substantiation of the request for confidential treatment or to withdraw the request. If substantiation is not submitted to the Commission within five business days, the request for confidential treatment would be denied. Such procedures would eliminate the need for the Commission to evaluate requests for confidential treatment prior to receiving a request for disclosure, would ensure that the Commission evaluated the request for disclosure in the context of current and complete information, would still allow the Commission

to respond to a FOIA request in a timely fashion, and would reduce the likelihood of applications for review of the staff rulings.

IV. Conclusion.

The Commission should take this opportunity to update its rules and procedures for handling requests for disclosure of confidential information subject to FOIA Exemption 4. The Joint Parties have suggested that the Commission codify standards for confidential treatment that are directly derived from recent jurisprudence interpreting Exemption 4. Adoption of these standards will eliminate the opportunity for competitors to use the Commission's Rules to disadvantage Commission regulatees, and that will reduce the administrative burdens faced by the Commission and its staff. The proposed standards are also consistent with Section 222 of the 1996 Act. The Joint Parties urge the Commission to adopt these proposed standards and the other revisions to its rules and procedures suggested in these Comments.

Respectfully submitted,

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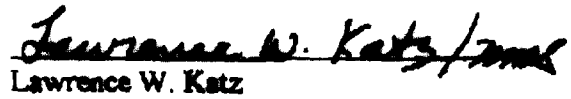

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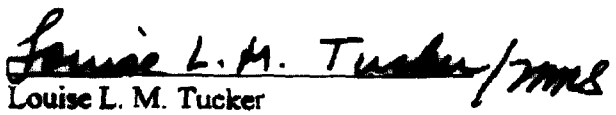

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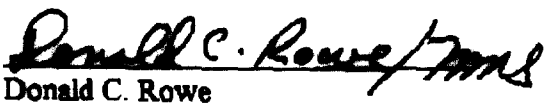

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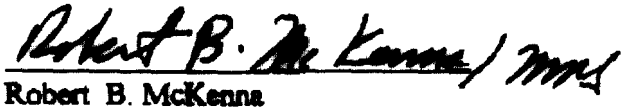

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June 14, 1996

GC Docket No. 96-55
Comments of Joint Parties
Appendix A
June 14, 1996

Proposed Revisions to
MODEL PROTECTIVE ORDER AND DECLARATION

To the extent that it is appropriate to rely on a protective order to protect confidential information, the terms and condition of the model order appended to the **Notice** do not provide a sufficient level of protection to prevent competitive harm. The Joint Parties suggest the following changes in the Model Protective Order.

1. Disclosure to Commission Staff, Consultants and Counsel of Reviewing Parties.

The Commission should adopt procedures to ensure that confidential information does not inadvertently become entangled with the thousands of publicly available documents with which the staff deals every day. Consultants under contract to the Commission should be permitted to review the confidential information only if they are not direct competitors of the submitting party, and only if they have signed, as part of their employment contract, a Non-Disclosure Agreement which includes nondisclosure and confidentiality obligations that survive their term of engagement. For example, to the extent the submitter is required to produce confidential information, including software code or associated documentation for one of its commercially licensed products, and a staff-retained consultant in his/her private business produces a competing product, that consultant should not be allowed to analyze or review the submitter's confidential information. Moreover, counsel for the reviewing party should be authorized to secure access to the confidential information only after signing the Declaration, described in Section 5, as amended by the language set forth below.

2. The Model Protective Order Designates Too Many Persons as Potential "Authorized Representatives."

Section 7.a. of the Model Protective Order permits counsel or the one person who has signed the Declaration form to disclose the confidential information to additional unlimited "authorized representatives". The Section "limits" authorized representatives to numerous in-house counsel, outside counsel, paralegals, secretaries, and other associated specified persons "except those in a position to use this information for competitive commercial or business purposes". Thus, a reviewing party could have an unlimited number of persons with access to the confidential information without the prior approval of the Commission. This provision allows too many persons access to the confidential information. The Model Protective Order should only

permit one in-house counsel, one outside counsel, one paralegal, one secretary, two in-house subject matter experts and one outside consultant to review the material (potentially seven authorized representatives per commenting party). To further expand the list of persons who are entitled to see the confidential information dilutes the effectiveness of the Protective Order.

Equally important, each person who is permitted to view the confidential information, not just the counsel, should be required to sign an acknowledgment agreeing to be bound by the Protective Agreement. This will ensure that each person with access to the data understands fully the sensitive nature of such data and his/her obligation to protect its confidentiality. Further, access to the confidential information should be limited to those parties who have already intervened in the proceeding. It the FOIA request is not made in the context of an active proceeding before the Commission, the requesting party should be required to demonstrate a compelling need for access to the information before access is granted, even subject to the protective agreement.

Further, to discourage unnecessary access to confidential information and to restrict unauthorized use, a section should be added to the Model Protective Order to limit the use and disclosure of confidential information as follows:

"Any Confidential Information provided by the Submitter shall be used exclusively for the purpose of participating in the particular proceeding, including any appeals, and shall not otherwise be used or disclosed for any other purpose. The limitation on the use or disclosure of any information disclosed during this proceeding shall be construed to prohibit disclosure of the Confidential Information and to prohibit making decisions, participating in any decision-making processes, or rendering advice, wherein any information or knowledge derived from said Confidential Information is utilized in any manner other than for the purposes of this particular proceeding."

This language was adopted and successfully used by the Commission in the Non-Disclosure Agreement it crafted for parties to sign in the ONA Tariff Proceedings.[59]

3. Reviewing Party's Counsel and Authorized Representatives Should be Required to Execute Private Non-Disclosure Agreements Directly with Submitter.

In limiting disclosure of the confidential information to persons who sign the Declaration attached to the Model Protective Order, each recipient of the confidential information must sign an enforceable acknowledgment of the obligations imposed by the non-disclosure agreement directly with the submitter of the information, providing for injunctive relief and liquidated damages. Such a provision will give the submitter of the information an additional enforcement tool to protect its proprietary interest in its confidential information. The prohibition on disclosure or use of the Confidential Information should survive the termination of the proceeding, and should remain binding indefinitely, unless the parties agree to limit the term of the agreement.

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[59] See, Commission Requirements for Cost Support Materials to be Filed with Open Network Architecture Access Tariff, 6 FCC Rcd. 5682, Com. Car. Bur., 1991; Commission Requirements for Cost Support Materials to be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd. 519 (Com. Car. Bur., 1991); and SCIS Disclosure Order, infra.

4. The Model Protective Order Should Not Allow Copies to be Made.

The Model Protective Order should not allow copies to be made. It is sufficient to participate in the proceeding for the recipients to view the material on the premises of the submitter and to take only limited notes. If the Commission finds that a "No Copy" rule is too restrictive, at a minimum, the recipient should be permitted to have only three copies; the copies should be numbered by the submitter at the submitter's premises, and all copies should be required to be returned to the submitter upon the conclusion of the case including any appeals. The recipient should be prohibited from making additional copies.

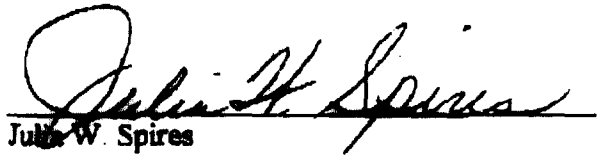
5. The Model Protective Order Should Contain More Specific Sanctions.

The sanctions set forth in Section 13 are not sufficiently strong to prevent unauthorized use as well as unauthorized disclosure. At a minimum, the Model Protective Order should contain specific sanctions that will be applied in the event of unauthorized use or disclosure, including forfeitures under Section 503 of the Telecommunications Act, 47 U.S.C. § 503. The existing sanctions in the **Notice** are ambiguous and appear to limit the sanctions to only unauthorized disclosure, not unauthorized use. In particular, limiting access by the breaching party to additional confidential information in the same proceeding is likely to be a toothless sanction insofar as the parties may already have received all of the confidential information that would be submitted in that proceeding. A more effective sanction would be to deny the party access to confidential information in <u>any</u> proceeding for a certain period to time, which should depend upon the severity of the breach. Moreover, the terms and conditions should contain specific remedies to protect the submitter of the confidential information from the effects of unauthorized use or disclosure, including a cease and desist order under Section 312(b) of the Act.

In sum, with these amendments and conditions, the Model Protective Order would reduce, but not eliminate, the risks that highly sensitive competitive Confidential Information submitted in a Commission proceeding could be used or disclosed without authorization.

CERTIFICATE OF SERVICE

I Julia W. Spires, do hereby certify that I have this 14th day of June, 1996, serviced all parties to this action with the foregoing "COMMENTS" reference GC DOCKET 96-55, by hand delivery or by placing a true and correct copy of the same in the United States Mail, postage prepaid addressed to the parties as set forth on the attached service list.



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